COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

INCOME TAX APPLICATION NO. 79 OF 2001
(Old No. 15 of 1998)

The Commissioner of Income Tax, Meerut
…….. Applicant

Versus

ONGC as agent of M/s Western Services Int., Dehradun
…….. Opposite Party

Shri P.Maulekhi, learned counsel for the applicant.
Sri J.P. Joshi, learned counsel for the opp. party.

Dated: 07.06.2006

Coram: Hon'ble P.C. Verma, J.
Hon'ble B.C. Kandpal, J.

This is an application under Section 256(2) of the Income Tax Act by the Revenue Department against the order of Income Tax Appellate Tribunal refusing refer the following question of law as framed in the application to this Court for its decision:-

> ***"Whether on facts and in the circumstances of the case, ld. ITAT is legally correct in vacating the order u/s 263 of I.T. Act passed by the CIT, Meerut relying upon its order dated 27.11.1996 in ITA No. 2492/Del/90, even though Refernece Application u/s 256/(1) of I.T. Act against the said order has been filed and is subjudice before the Hon'ble ITAT?***

The case of the Department is that ld. ITAT allowed appeal of the assessee vacating the order u/s 263 of I.T. Act, 1961, passed by CIT, Meerut, directing thereby to charge interest u/s 139(8)/251/217 of I.T. Act having not been charged originally. Ld. ITAT While allowing the appeal of the assessee under consideration, has held that after final appellate orders, no tax is found payable by the assessee, as the tax payable was

Rs. 24,92,753/- against which advance tax paid was Rs. 32,48,609/-. Hence, no interest was chargeable and as such the order passed u/s 263 of I.T. Act is of academic interest only. Against the said order of CIT(A), Department filed appeal before Income Tax Appellate Tribunal. The Tribunal vide his order under reference decided the matter against the department. The findings given by the ITAT has been based on the decisions in ITA No.4228/Del/89 and No.4229/Del/89.

Learned counsel for the Revenue Department contended that the decision of ld. ITAT is not acceptable because the original assessment was framed treating the servicees rendered by Non-Resident Company as covered under Section 40-D of the I.T. Act, as against Section 44-BB of the Act shown in the return. He further contended that the matter regarding determination of income on which interest u/s 139(8)/215/217 can be chargeable is still sub-judiced before this Court, hence the present application is liable to be allowed. We find force in the contention of learned counsel for the Revenue Department. Since, the judgment of the Tribunal is sub-judiced in reference before this Court, therefore it would be just and proper and would be in the interest of justice to allow the application and to direct the Appellate Tribunal to draw a statement of facts and refer the question of law to this Court for its decision.

Hence, the application is allowed. The learned Tribunal is directed to refer the above statement of fact and record and above question of law to this Court for its decision.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

Rajeev Dang